**In the District Court of the United States for the Western District of Virginia Lynchburg Division**

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CIVIL ACTION No. 201

AUBREY B. BURTON, D/B/A A. B. BURTON COMPANY, PLAINTIFF

*v.*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

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**MOTION TO AFFIRM**

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Proffered for filing Dec. 8, 1949. C. E. Gentry, Clerk. By Otway Petticrew, Deputy Clerk.

Appellee, pursuant to Rule 12, Paragraph 3, of the Revised Rules of the Supreme Court of the United States, moves that the judgment and decree of the District Court be affirmed.

This is a direct appeal from a final judgment and decree, entered on September 17, 1949,[1] by a specially constituted District Court of three judges, pursuant to Sections 1253, 2284 and 2325, Title 28 of the United States Code, dismissing appellant's complaint seeking to set aside an order of the Inter-

[1] The Court also rendered its opinion on September 17, 1949; one judge dissenting.

state Commerce Commission. Appeal was allowed on November 16, 1949, and appeal papers served on November 22, 1949.

One of the Commission's orders under attack, dated January 30, 1942, is designated as Service Order No. 68,[2] (49 U.S.C. 1(15)),[3] which sus-

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[2] Service Order No. 68, issued pursuant to Section 1(15), Part I of the Interstate Commerce Act (49 U.S.C. 1(15)), in terms provided that due to the existing state of war, and the emergency caused thereby, immediate action was necessary to prevent a shortage of railway equipment and congestion of traffic; that the provisions contained in Rules 24 and 34 of Consolidated Freight Classification No. 14, and other tariffs containing provisions with respect to furnishing, substitution, and use of multiple cars for single shipments, subject to carload rates, results in wasteful car service and that such misuse and wasteful use of cars as detrimental to the public interest and the prosecution of the war; and that the operation of Rule 34, insofar as it permits railway freight cars to be used for shipment of carload freight otherwise than subject to the carload minimum weight for each car actually used, is suspended, and that the order shall become effective February 15, 1942, and shall remain in force until further order of the Commission.

[3] Section 1(15) of the Act reads (in part) as follows:

> "Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to

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pended the operation of Rule 34 of the Consolidated Freight Classification.[4]

Following the entry of the aforesaid order, to wit, on April 17, 18 and 21, Herman M. Brown Company shipped four carloads of road building machinery from Highland Park, Iowa, to appellant at Keller, Virginia. The shipper had ordered of the carrier four 40-foot cars for these shipments, but the carrier not having available the size car ordered, delivered two 48½-foot cars, one 42-foot 1-inch car, and one 41-foot car. The weights of each shipment were less than the carload minimum provided for open cars of 40 feet in length on which the rate, prior to the effective date of Service Order No. 68, suspending Rule 34, would have been based on the minimum weight applicable on the 40-foot cars ordered. Due to these circumstances appellant was required to pay freight charges assessed for the minimum weights applicable on the larger cars furnished which aggregated $276.00 more than he would have been required to pay had Rule 34 been in force.

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be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. * * * "

[4] Rule 34 of the Consolidated Classification provides in substance that railroads are permitted to furnish shippers longer cars than ordered if the carrier is unable to furnish the size of car requested, and the charges therefor will be based upon the weight for the size of the car ordered rather than upon the weight for the size of the car furnished and used.

Appellant instituted a complaint proceeding before the Commission in which he alleged that the freight charges assessed against him on the aforesaid shipments were unjust and unreasonable and sought to have the Commission award him reparations for the alleged overcharges. This complaint was dismissed by the Commission on September 28, 1944, but the proceedings were later reopened on appellant's petition therefor and after hearing and oral argument, the Commission, by its report and order of December 5, 1945, again dismissed the complaint, affirming its earlier finding that the freight charges based on carload minima for cars furnished in lieu of carload minima for cars of size ordered on shipments of road building machinery from Highland Park, Iowa, to Keller, Va., were not shown to have been, or to be, unreasonable.

With respect to appellant's insistence that the Commission's action in suspending the operation of Rule 34 (the so-called carriers' convenience provision) did not authorize the carriers to ignore shipper's order, and that it was unreasonable for the carriers to furnish longer cars than ordered, the Commission found that while the facts established that it was possible for the shipper to have loaded the shipments on the smaller cars ordered, there was an absence of any showing of the conditions under which the longer cars were furnished or the reasons why such longer cars were not declined by the shipper at origin and not used. The shipper could have declined to accept these cars but he did not do so.[5]

[5] "The facts of record, as summarized in the prior report, are confirmed by the record on oral hearing. It is not shown

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Appellant's petition for reconsideration and rehearing was denied by the Commission. Later in January 1948, appellant filed another petition for reopening and reconsideration which the Commission denied by its order of April 5, 1948. In this last petition plaintiff for the first time alleged that Service Order No. 68 was invalid because no termination date was fixed in the order.

By its suit in the statutory three-judge court to set aside the orders of the Commission, hereinbefore mentioned, we submit that appellant's real purpose was to have that Court adjudicate that

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that defendants were negligent in furnishing the larger cars. The shipper accepted and used the cars furnished in order to meet complainant's urgent need for the road scrapers. It is clear that the charges collected were applicable under the governing tariff provision established on March 17, 1942, in compliance with Service Order No. 58, providing, in effect, that where the shipper orders a car of a certain size and the carrier furnishes and the shipper uses a larger car, the applicable charges are those based on the carload minimum for the car furnished and used and not the carload minimum published in defendants' tariff for the car ordered.

"Complainant contends that to permit defendants to collect and retain charges based on the higher minima, provided for cars of the length used, is not in consonance with the declared purpose of the provision which was to conserve equipment in order to aid in the effective prosecution of World War II. This contention does not accord with provisions of our published order. By providing, in effect, that a shipper must reject the larger car, or at its convenience accept the car furnished for loading and pay the applicable charges for its use, the requirements contained in the provision are fair both to the shipper and carrier, and were clearly designed to conserve equipment by discouraging the carrier from furnishing and the shipper from accepting and using a car larger than actually necessary for transportation of the shipment. This objective of the tariff provision would not obtain if refund of freight charges were permitted to the basis of the lower minima for the shorter cars ordered but not used." (Commission's report dated December 5, 1945, attached to plaintiff's complaint (filed in three-judge District Court) as Exhibit 1.)

Service Order No. 68 was invalid when issued and to direct the Commission to award appellant reparations. The principal ground of invalidity urged was that the order was made effective for an indefinite period in that it failed to fix a date for its termination. Appellee insists that, as the District Court held, the Commission was not required to fix a termination date of an emergency in its orders issued under Section 1(15) as a condition to their validity. In fact it was impossible for the Commission or any other tribunal or person to know or to determine when the war would end. Moreover, the statute (Section 1(15)) confers broad powers on the Commission in issuing orders of this sort. This section provides that when the Commission finds an emergency exists it may suspend existing rules, regulations and practices upon its own initiative, with or without notice or hearing, as its judgment dictates. It would be difficult to conceive of a statute which confers broader authority or greater administrative discretion. In view of this almost unrestricted power which Congress has conferred upon the Commission, the three-judge District Court could not see, nor can appellee see, any justification for the imposition upon it of a restriction which is neither expressed nor implied by the language used in the statute.

Appellant relies upon the case of *United States v. Thompson*, (D.C. Mo.) 58 Fed. Supp. 213, 216-7, in support of the position that if an order issued under Section 1(15) contains no fixed date for its termination it is invalid. The *Thompson* case is distinguishable from the instant case in that the

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former suit was instituted under a statute which was penal in application and provided for a penalty for each violation of the Commission's order. With respect to the penal application of the statute under which that action was brought the Court observed that the statute should be strictly construed.[6]

In its jurisdictional statement appellant urges that the instant proceedings should be reviewed by the Supreme Court and the decision of the statutory three-judge District Court reversed because that Court gave a different interpretation to the meaning of the provisions of Section 1(15) of the Interstate Commerce Act than that given by the District Court (a single judge) in the *Thompson* case, *supra*.[7] Appellant is attempting to invoke the provision of paragraph 5(b) of Rule 38 of the Revised Rules of the Supreme Court of the United States as a means of obtaining review of his case by the Supreme Court. That rule applies to a review on writs of certiorari where there have been conflicting decisions of Circuit Courts of Appeals,[8] and there is no similar rule applicable to decisions of United States District Courts. Therefore, it is insisted that this rule of the Supreme Court

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[6] "In reaching the conclusions here expressed, we have not been unmindful that the statute under which the Government is proceeding, being penal in its application, providing a penalty for each violation * * * which penalty the plaintiff seeks to collect by this action, should be strictly construed." [Citing Providence Steam Engine Co. v. Hubbard, 101 U.S. 188, 191.] U. S. v. Thompson, 58 F. Supp. 213, 218.

[7] Jurisdictional Statement, pages 3-4.

[8] Rule 38 provides for review on writ of certiorari of decisions of Circuit Courts of Appeals, paragraph 5:

> "(b) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter. * * *"

affords appellant no basis for a review of the decision of the statutory court.

Appellee submits that this appeal involves no substantial questions. Appellant's arguments, as revealed by its Jurisdictional Statement, with the exception of the claim that Service Order No. 68 is invalid because no termination date was fixed in the order, are simply reiterations of arguments previously rejected by the Commission and the three-judge District Court, addressed to matters lying within the discretion of the Commission. With respect to the claim of invalidity of the Service Order, for the reason asserted, it is pointed out that the three-judge court considered this ground relied upon by appellant and rejected it because there was no provision, expressed or implied, by the language of the statute furnishing any justification for such an interpretation.

Furthermore, it is insisted that Congress never intended that Section 1(15) of the Act should have the distorted and strained construction which is contended for by appellant. In this connection reference is made to appellant's claim as revealed in its Jurisdictional Statement, that Service Order No. 68 is invalid because the statute does not confer authority on the Commission to suspend Rule 34 of the Classification due to an emergency on a nation-wide basis but only when such emergency exists in certain sections of the country. There is no foundation whatsoever for such an interpretation, and further comment with respect thereto is believed unnecessary.

For the foregoing reasons, it is evident that this appeal presents no substantial question. It is,

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therefore, respectfully submitted that the judgment of the District Court should be affirmed.

DANIEL W. KNOWLTON,
*Chief Counsel,*
*Interstate Commerce Commission.*

DECEMBER, 1949

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